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NO. 81-6633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out by petitioner, this case involves the following statutory provisions:

Ga. Code Ann. § 27-2529 (Supp. 1981): Payment of fine as condition precedent to probation in felony cases

In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion impose a fine on such person so convicted as a condition to such probation. Such fine shall not exceed $10,000 or the amount of the maximum fine which may be imposed for conviction of such a felony, whichever is greater. In any case where probation shall be revoked, the defendant shall not be entitled to any rebate or refund of any part of such fine so paid.

Ga. Code Ann. § 27-2709 (Supp. 1981): [Statewide Probation Act]; jurisdiction of courts; procedure; hearings; reference to circuit probation supervisor; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation

(a) Any court of this State which has original jurisdiction of criminal actions, except juvenile courts, municipal courts and probate courts where the defendant in a criminal case has been found guilty upon verdict or plea, or who has been sentenced upon a plea of nolo contendere, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(b) Prior to such hearing, the court may refer the case to the circuit probation supervisor of the circuit in which such court is located for investigation and recommendation. The court, upon such reference, shall direct the supervisor to make an investigation and report to the court in writing at a specified time upon the circumstances of the offense and the criminal record, social history and present condition of the defendant, together with such supervisor's recommendation, and it shall be the duty of the supervisor to carry out the directive of the court.

(c) If it appears to court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed upon such defendant except as

provided in sub-section (d).

* * *

(e) The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation.

* * *

(g) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of said probated sentence, and such judge is hereby empowered to revoke any or all of said probated sentence, rescind any or all said sentence, or in any manner deemed advisable by said judge to modify or change said probated sentence at any time during the period of time originally described for the probated sentence to run.

Ga. Code Ann. § *27-2901* (*Rev. 1978*): *Time of payment of fines*

Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant.

Ga. Code Ann. § *27-3001* (*Supp. 1981*): *Policy*

It is hereby declared to be the policy of this State that restitution by those found guilty of crimes to their victims is a primary concern of the criminal justice system.

Ga. Code Ann. § *27-3002* (*Supp. 1981*): *Definitions*

For the purposes of this Chapter, the following terms shall have the meanings herein ascribed to them unless the context clearly requires otherwise:

(a) The term "board" shall mean the State Board of Pardons and Paroles.

(b) The term "department" shall mean the Department of Offender Rehabilitation.

(c) The term "damages" shall mean all damages which a victim could recover against an offender in a civil action, including a wrongful death action, based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium.

(d) The term "offender" shall mean any natural person placed on probation under the First Offender Act, sentenced for any crime or any juvenile adjudged delinquent or unruly.

(e) The term "ordering authority" shall mean the court of competent jurisdiction, the State Board of Pardons and Paroles, or the Department of Offender Rehabilitation, or any combination thereof, as is required by the context.

(f) The term "relief" shall mean any suspended or probated sentence including probation imposed under the First Offender Act, any parole or other conditional release from incarceration, the awarding of earned time, the reduction in security status or the placement in prison rehabilitation programs, included, but not limited to, those in which the offender receives monetary compensation.

(g) The term "restitution" shall mean any property or lump sum of periodic payment ordered to be made by any offender to any victim by any ordering authority. Where the victim is a public corporation or governmental entity, or where the offender is a juvenile, restitution may also be in the form of services ordered to be performed by the offender.

(h) The term "restitution order" shall mean any order, decree, or judgment of an ordering authority which requires an offender to make restitution as a condition or term of any relief granted to an offender.

(i) The term "victim" shall mean any natural person or his personal representative, or any firm, co-

partnership, association, public or private corporation, or governmental entity suffering damages caused by an offender's unlawful act.

Ga. Code Ann. § 27-3003 (Supp. 1981): Adults

The judge of any court of competent jurisdiction may order that an adult offender make restitution as a condition of any relief ordered by the court. The State Board of Pardons and Paroles may order that an adult offender make restitution as a condition of any relief ordered by the board. The Department of Offender Rehabilitation may order that an adult offender make restitution as a condition of any relief ordered by the department.

Ga. Code Ann. § 3006 (Supp. 1981): Past restitution considered

Where an offender has made total or partial restitution to a victim, the ordering authority shall consider the fact of such restitution in considering any case within its power.

Ga. Code Ann. § 27-3008 (Supp. 1981): Required findings

(a) In deciding any case subject to this Chapter, the ordering authority shall, before granting any relief, make a written finding either:

(1) That there are no victims to whom restitution should be made under the policy of this State; or

(2) That the circumstances of the case are such that no restitution order or plan is reasonably possible; or

(3) That the offender, in cooperation with the ordering authority, has developed and consented to a plan of restitution which shall be made a part of a restitution order; or

(4) That restitution will be ordered as a condition of the relief.

(b) The failure to make a finding as required by this

section, however, shall not invalidate any order or other action of the ordering authority.

Ga. Code Ann. § 27-3009 (Supp. 1981): Restitution not to exceed damages

The amount of restitution ordered may be equal to or less than, but not more than, the victim's damages.

Ga. Code Ann. § 27-3010 (Supp. 1981): Factors considered

In determining the nature and amount of restitution, the ordering authority shall consider:

(a) The present financial condition of the offender and his dependents;

(b) The probable future earning capacity of the offender and his dependents;

(c) The amount of damages;

(d) The goal of restitution to the victim and the goal of rehabilitation of the offender;

(e) Any restitution previously made;

(f) The period of time during which the restitution order will be in effect;

(g) Other appropriate factors as the ordering authority shall deem to be appropriate.

Ga. Code Ann. § 27-3012 (Supp. 1981): Modification

The ordering authority shall retain jurisdiction to modify a restitution order at any time before the expiration of the relief ordered.

Ga. Code Ann. § 27-3013 (Supp. 1981):

* * *

(c) Failure to comply with a restitution order may be, in the discretion of the ordering authority, grounds to revoke or cancel the relief at any time the restitution order is in effect. When the relief is earned time, the Department of Offender Rehabilitation may sus-

pend the offender from earning earned time for a specified period of time.

Ga. Code Ann. § 27-3016 (Supp. 1981): Peonage; denial of benefits because of poverty

(a) Nothing in this Chapter shall authorize peonage, and this Chapter shall be construed and diligently administered to prevent peonage.

(b) No offender shall be denied any benefit, relief, or privilege to which he might otherwise be entitled or eligible solely because he is financially unable and cannot become financially able to make restitution.

STATEMENT OF THE CASE

With the following additions, respondent accepts petitioner's statement of the case. When petitioner was sentenced to serve probation both he and his counsel consented in writing to the order directing payment of the fine and restitution. (J.A. 4-5, 9-10). At the hearing on the State's revocation petition, it was established that with money borrowed from his parents petitioner paid the $100.00 he was ordered to pay on October 8, 1980 and the $100.00 he was required to pay by October 9, 1980. (J.A. 27-29, 30-31, 34). He failed, however, to pay the $550.00 balance during the period allowed by the trial court. (J.A. 27-29, 30-31, 33). Petitioner and his wife testified that he had no job, income, or assets. (J.A. 32, 35-37). He had not worked since November 1980, when he was laid off from his job at a Rockwell International plant. (J.A. 32, 41).

SUMMARY OF ARGUMENT

This case presents the issue of whether the probation of an indigent defendant may be revoked for failure to comply with probation conditions requiring payment of

a fine and restitution. Petitioner asserts that the revocation violates the Equal Protection Clause of the Fourteenth Amendment. The usual method of resolving such issues is first to decide what standard of equal protection review to employ and then to apply that standard to the case at hand.

The traditional rationality standard of equal protection review should be used in this case. The state action in question is not based on a suspect or other questionable criterion so as to provoke heightened scrutiny. Moreover, no fundamental constitutional right is burdened. Thus, heightened scrutiny under a fundamental rights analysis would also be inappropriate.

The revocation of petitioner's probation satisfies the rationality standard of equal protection review. This standard requires that there be a rational relationship between a legitimate state interest and the state action in question. Probation serves two ligitimate state interests in Georgia: (1) the protection of the public, and (2) the rehabilitation of the offender. In addition, a third state interest is involved in this case: The provision of restitution to crime victims. The revocation of petitioner's probation serves the first interest because petitioner's inability to pay the fine and restitution amounts made him a poorer probation risk and increased the likelihood that he would commit additional crimes. Furthermore, the revocation promotes petitioner's rehabilitation by removing him from circumstances in which the likelihood of his committing a crime had increased. And, the state action in question is consistent with Georgia's policy of promoting restitution. Thus, three legitimate state interests are rationally furthered.

The principles espoused in *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971), do not

cast doubt upon the above-stated conclusion. In both of these cases the incarceration periods in question did not serve any penal or other legitimate state interest(s).

Therefore, the state action in question here meets the requirements of the Equal Protection Clause. Hence, the judgment of the Georgia Court of Appeals should be affirmed.

ARGUMENT

Petitioner contends that the revocation of his probation violates the Equal Protection Clause of the Fourteenth Amendment. The Court noted in an earlier case involving similar facts that the question presented here is a "difficult equal protection issue." *Wood v. Georgia*, ___ U.S. ___, 101 S.Ct. 1097, 1099 (1981). Respondent will first discuss the matter of the proper standard of equal protection review to be used and will then deal with the application of that standard to this case.

A. THE PROPER STANDARD OF EQUAL PROTECTION REVIEW

The Equal Protection Clause has been held to require varying levels of scrutiny depending on the nature of the classification created by the state action in question. The highest level is called "strict scrutiny" and is invoked when a suspect criterion is the basis of the state classification. For example, the Court has held race, *Loving v. Virginia*, 388 U.S. 1 (1967), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), to be suspect criteria.

A similar level of scrutiny has sometimes been employed when a state classification burdens a fundamental constitutional right. The Court has, for instance, declared statutes unconstitutional which fail to promote compelling governmental interests and which burden the

right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or right to vote. *Hill v. Stone*, 421 U.S. 289 (1975). This fundamental rights analysis has been called a branch of strict scrutiny review. *Plyler v. Doe*, ___ U.S. ___, 102 S.Ct. 2382, 2394-95 (1982); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1003-05 (1978); J. NOWAK, R. ROTUNDA and J. YOUNG, CONSTITUTIONAL LAW 524-25 (1978).

The Court has also on occasion employed an intermediate standard of review. This standard has been used to evaluate state classifications which "give rise to recurring constitutional difficulties." In order to survive review under this standard, classifications must "further [. . .] . . . substantial interest[s] of the State." *Plyler*, *supra*, at 2395; *see also Caban v. Mohammed*, 441 U.S. 380, 388 (1979). State classifications based on gender, *Craig v. Boren*, 429 U.S. 190 (1964), and illegitimacy, *Levy v. Louisiana*, 391 U.S. 68 (1967) (purporting to employ a rationality standard), have been examined under this intermediate standard.

The basic standard of equal protection review employs only the yardstick of rationality. This standard is used to evaluate "most forms of state action." *Plyler*, *supra*, at 2394; *see also Zobel v. Williams*, ___ U.S. ___, 102 S.Ct. 2309, 2313 (1982). An early statement of the rationality test can be found in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920):

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Id., at 415, *quoted in Reed v. Reed*, 404 U.S. 71, 75 (1971); *see also McGowan v. Maryland*, 366 U.S. 420 (1961). This least demanding standard, which has been used to review an increased number of state actions in recent years, is not satisfied by cursory scrutiny. G. GUNTER, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). It is not the case, as some have asserted, that this level of review is "largely toothless." L. TRIBE, *supra*, at 1082.

Before taking up the issue of what standard of review should be used to evaluate the state action in question here, several distinctive features of the action should be mentioned. *First*, the facial consitutionally of Georgia's Statewide Probation Act is not, in respondent's view, in doubt. The language of the statute does not classify on the basis of wealth. Respondent assumes that petitioner's attack is, rather, on the application of the statute to him. Presumably, his contention is that the statute has been applied to him in such a way so as to violate the Equal Protection Clause. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). A *second* and related point is that the revocation of petitioner's probation resulted from an individualized state determination and was not brought about by the operation of an inflexible general rule. *See Turner v. Dept. of Employment Security of Utah*, 423 U.S. 44, 46 (1975) ("[w]hen basic human liberties are at stake" legitimate state ends must be achieved through "more individualized means.") In other words, no "irrebuttable presumption" is involved in the state action involved here: Petitioner was permitted to argue and offer evidence against revocation. *See Shapiro, supra*, at 631. In fact, probation is, by nature, an individualized procedure. *Burns v. United*

States, 287 U.S. 216, 220 (1932). *Third*, the state action in question cannot sensibly be called a classification or an instance of differential treatment. Petitioner has not suggested that he has been treated any differently from other Georgia probationers who fail to obey financial conditions of their probation. Rather, petitioner's complaint is that he was *not*, because of his indigency, treated differently. Thus, the State's failure to classify—not a State classification—is involved here. It has been noted that state failures to classify are generally more restitant to constitutional challenge. L. TRIBE, *supra*, at 993-94.

The state action in question here should not be reviewed under the strict or intermediate standards. Generally, those standards are used when suspect or dubious criteria are employed or when fundamental constitutional rights are directly affected. The criteria that provoke heightened scrutiny are, for the most part, immutable characteristics—as race, gender, and illegitimacy. Moreover, the Court has never considered wealth or financial ability, which petitioner asserts was the basis for his probation revocation, to be a suspect criterion or even of such nature as to require intermediate equal protection review. The Court has said, "[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Maher v. Roe*, 432 U.S. 464, 471 (1971). *See also San Antonio Independent School District*, *supra*, at 29. Neither does the state action in question here provoke strict scrutiny by burdening a fundamental constitutional right. Indeed, "Probation is . . . conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it be granted on a specified showing." *Burns*, *supra*, at 220, (1932); *see also id.*, at 223 ("proba-

tion is a matter of grace"); *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935). Moreover, it must be considered that probationers, because of their status as law-breakers, do not have the same due process and liberty rights as others. *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Consequently, the conditions of their probation may affect their "ability to exercise constitutionally protected rights." *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). In fact, "[S]tate[s have] a compelling interest in limiting [probationers'] liberty in order to effectuate their rehabilitation and to protect society." *Owens v. Kelly*, ___ F.2d ___, No. 80-9010, slip. op. at 2267 (11th Cir., August 5, 1982). Because, therefore, there is no right, constitutional or otherwise, to probation,[1] and because probation conditions may limit constitutional rights, it is difficult to see how a state probation decision could for purposes of equal protection review burden the exercise of a fundamental constitutional right. Petitioner suggests nevertheless, that the revocation of his probation should be strictly scrutinized because his fundamental right to vote may be affected. This argument is quite feeble. Petitioner seems to forget that "the sentence was not imposed . . . because of his indigency but because he had committed a crime." *Williams v. Illinois, supra*, at 242. Any effect on petitioner's right to vote will result from his having committed burglary not from his inability to pay a fine and restitution. We are thus led to conclude that neither strict nor intermediate scrutiny should be applied.

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[1] Of course, one has a right under the Equal Protection Clause not to be subjected to the unequal administration of a probation system. However, the Court has recognized that interests without the independent status of fundamental constitutional rights do not achieve that status merely by receiving protection under the Equal Protection Clause. *San Antonio Independent School District, supra*, at 30-34.

The state action involved here should, therefore, be reviewed under the rationality standard. This conclusion is consistent with the Court's decisions. In *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion), the Court held that Illinois could not refuse to provide a free trial transcript to an indigent criminal defendant when the transcript is necessary for "adequate appellate review." *Id.*, at 19. This decision was based both on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974). In *Ross, supra*, the Court said that the right of indigents to meaningful appellate review is best considered under an equal protection analysis. *Id.*, at 611. The Court also in *Ross, supra*, discussed numerous decisions spawned by *Griffin, supra*, and summarized them in this fashion, "Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment." *Ross, supra*, at 607. One of the decisions was *Douglas v. California*, 372 U.S. 353 (1963), in which the Court invalidated on equal protection grounds California's practice of not providing appointed counsel to assist all indigent criminal defendants in their rightful appeals.

Although the structure of the equal protection analysis used in *Griffin, supra*, and its progeny is not entirely clear, it appears that a rationality standard was used. In *Griffin, supra*, the Court said, "Plainly the ability to pay costs in advance bears *no rational relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.*, at 17-18 (plurality opinion) (emphasis added); *id.*, at 21-22 (state cannot make "differentiations" in criminal appellate systems which "have no relation to a rational policy of criminal

appeal") (Frankfurter, J., concurring). In a later case, the Court summarized *Griffin, supra,* and *Douglas, supra,* as follows:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of *unreasoned distinctions* that can only impede open and equal access to the courts. (emphasis added)

Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966).

The conclusion that *Griffin, supra,* and its progeny employ a rationality standard is reinforced by other decisions regarding procedures ancillary to the criminal justice system. In *Ross, supra,* the Court decided an issue left open in *Douglas, supra,* at 356—whether a state must provide counsel to an indigent criminal defendant seeking a discretionary appeal. Noting that in discretionary appeals to the North Carolina Supreme Court from that State's intermediate appellate court the "critical issue is not whether there has been 'a correct adjudication of guilt,' " the Court held that North Carolina is not required by the Equal Protection Clause to provide counsel for such appeals. *Ross, supra,* at 615. The rationality standard was employed. *Id.,* at 612. In several cases concerning state schemes for recoupment of costs for providing legal services to indigent criminal defendants, the Court employed the rationality standard of equal protection analysis. *Fuller v. Oregon,* 417 U.S. 40, 49 (1974); *James v. Strange,* 407 U.S. 128, 140-41 (1972); *Rinaldi, supra,* at 308-09. In *Baxtrom v. Herold,* 383 U.S. 107 (1966), the Court was faced with a New York procedure which treated mentally ill persons who were civilly committed at the end of a prison term more harshly than other mentally ill persons who were civilly committed.

Because there was no "semblance of rationality of the classification" the Court found that the procedure violated the Equal Protection Clause. *Id.*, at 115. Finally, in *McGinnis v. Royster*, 410 U.S. 263 (1973), the Court employed the rationality standard in upholding a New York procedure which denied "good time" credit to state prisoners for their presentence incarceration in county jails. *Id.*, at 270.

If the rationality standard was employed in *Griffin*, *supra*, and its progeny, *a fortiori* it should be used in the instant case. As the Court pointed out in *Griffin*, *supra*, although states are not required by the federal constitution to provide appellate courts, "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Id.*, at 18. Focusing on the law of the state involved in that case, the Court added that "appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." *Id.* In a later decision the Court explained *Griffin*, *supra*, and *Douglas*, *supra*, as follows, "This Court often has voided state statutes and practices which denied to accused indigents the means to present effective defenses in courts of law." *James*, *supra*, at 134. By contrast, probation decisions do not involve guilt or innocence: They are not part of the fact-finding apparatus. In *Gagnon*, *supra*, the Court acknowledged, "Probation revocation, like parole revocation is not a stage of a criminal prosecution. . . ." *Id.*, at 782. The Court also observed that, "[T]here are critical differences between criminal trials and probation or parole revocation hearings. . . ." *Id.*, at 788-89. And, in *Berman v. United States*, 302 U.S. 211 (1937), the Court said, "Pro-

bation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered." *Id.*, at 220. Thus, if heightened scrutiny has not been applied to state actions which affect the reliability of determinations of guilt, it certainly should not be applied to state probation decisions. Should the Court conclude, however, that state actions of the former sort require closer scrutiny, state probation decisions, nevertheless, should, because of their less critical status, be reviewed only under the rationality standard. *See Ross, supra*, at 612, 615 (rationality standard used to review state practice of not providing appointed counsel for discretionary appeals not critically concerned with correctness of adjudication of guilt).

Neither *Williams v. Illinois, supra*, nor *Tate v. Short*, 401 U.S. 395 (1971), supports the use of heightened scrutiny in the instant case. In both cases the criminal defendants were punished beyond state statutory maximums solely because of their inability to pay fines. Although neither decision speaks in traditional equal protection language, it appears that the analyses are consistent with the rationality standard. The Court discusses in both cases the rationality of the state actions in question. *Williams, supra*, at 239; *Tate, supra*, at 399 (imprisonment serves no "penal objective of the State" and "obviously does not serve" the purpose of "augment[ing] the State's revenues"). Therefore, for this and the above-mentioned reasons, the rationality test of equal protection should be used to review the state action in question here.

B. APPLICATION OF THE RATIONALITY TEST

In order to apply the rationality test, we must first identify the legitimate state interest(s) served by the revocation of petitioner's probation. The Eleventh Circuit has noted:

> The case law of Georgia . . . indicates that two essential purposes of probation in Georgia, as elsewhere are the rehabilitation of the probationer, and the protection of society.

Owens, supra, slip. op. at 2266, *citing State v. Collett*, 232 Ga. 668, 669 (1974), and *Inman v. State*, 124 Ga.App. 190, 192 (1971). The language of the Georgia Statewide Probation Act accommodates these purposes:

> If it appears to court [sic] upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

Ga. Code Ann. § 27-2709(c) (Supp. 1981). This section mandates that no one be admitted to probation unless it appears that he is "not likely to engage in a criminal course of conduct." Obviously, this requirement aids in the protection of society. And the requirement that it appear that "the ends of justice do not require that the defendant shall presently suffer the penalty imposed by law" accommodates both the rehabilitation of the probationer and the protection of society. A third state interest involved in this case is Georgia's strong interest in restitution. According to a Georgia statute:

> It is hereby declared to be the policy of this State that restitution by those found guilty of crimes to their victims is a primary concern of the criminal justice system.

Ga. Code Ann. § 27-3001 (Supp. 1981).

These three purposes or interests of the State of Georgia are, of course, legitimate. No serious argument to the contrary could be made. Note that these interests are particularly important because they are articulated and not merely conceivable. *McGinnis, supra,* at 270.

The revocation of petitioner's probation is rationally related to Georgia's legitimate interest in administering probation in such a way so as to protect society. This is respondent's primary position. Secondarily, respondent maintains that the revocation rationally furthers petitioner's rehabilitation. Note that the rationality standard does not require that a state classification further all state interests or even the primary state interest. *McGinnis, supra,* at 274-77.

The revocation in question is rationally related to the protection of society in two ways. *First,* petitioner's inability to pay the balance of his fine and restitution altered the trial court's initial determination that he was a good probation risk and not "likely to engage in a criminal course of conduct." Ga. Code Ann. § 27-2709(c) (Supp. 1981). *Second,* the revocation of petitioner's probation helps to protect society by maintaining public confidence in the Georgia criminal justice system. Petitioner will now discuss these two propositions.

Petitioner's inability to pay the balance of his fine and restitution increased the likelihood that he would commit another crime and made him a poorer probation risk than it had first appeared. Although this is not a pleasant con-

clusion for one to draw, it is certainly rational. It should be kept in mind that governmental decisions need not be based on conclusive scientific evidence in order to be rational or constitutional. *See McGinnis, supra,* at 270. With regard to the regulation of obscene materials, which impinges upon preferred First Amendment rights, the Court has said:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could *quite reasonably* [emphasis added] determine that such a connection does or might exist. In deciding *Roth* [*v. United States*, 354 U.S. 476 (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "*the social interest in order and morality.*" (cit. omitted) (emphasis in original)

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

There is, nonetheless, considerable data which support the proposition that crime and probation success are related to financial ability and the associated attribute of employment. For example, one study has shown that in the year prior to their arrests, 41.4 percent of inmates of state correctional facilities in 1979 either had no income or income less than $3,000. Similar findings have been made about inmates of local jails. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 463, 485 (1981); *see also id.*, at 488 (1980). The same study established that the associated characteristic of unemployment is also related to incarceration. Fully 29.5 percent of inmates of state correctional facilities in 1979 had been unemployed the year prior to their arrests and another 9.9 percent had worked only part time. Again, similar figures apply to inmates of local jails. *Id.*, at 463, 485 (1981). One study has sug-

gested that the higher arrest rate among blacks than whites is a function not of race or discrimination in law enforcement but of the average lower socio-economic characteristics of blacks, including high unemployment. E. GREEN, *Race, Social Status, And Criminal Arrest*, AMERICAN SOCIOLOGICAL REVIEW 35:476-90 (1970); *see also* U.S. DEPARTMENT OF COMMERCE, CRIME AND EMPLOYMENT ISSUES 86 (1978) ("there is indeed a relationship between unemployment and crime"); M. WOLFGANG, R. FIGLIO, and T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972) (low socio-economic status, including low family income, associated with delinquency); *but see* C. TITTLE & W. VILEMEZ, *The Myth Of Social Class And Criminality: An Empirical Assessment Of The Empirical Evidence*, AMERICAN SOCIOLOGICAL REVIEW 43:643-56 (1978), and studies cited therein. As to the relationship between unemployment and probation success, one study concluded:

> The results of the analysis of 14,385 cases in 19 probation departments show that probationers who were unemployed were universally more likely to violate the terms of their release than probationers who were steadily employed during the entire probation period.
>
> * * *
>
> [T]he data reveal a distinct trend; with an increase in degree of employment there is an indication of a decrease in the relative frequency of violation.
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> * * *
>
> On the basis of this test of importance, steadiness of employment during the probation period is the most important factor in its bearing on probation outcome.

U.S. DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES II: 406-07 (1974); *see also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT CORRECTIONS 27-37 (1967), *reprinted in* R. CARTER & L. WILKINS, PROBATION, PAROLE, AND COMMUNITY CORRECTIONS 104 (1976); R. CLEGG, PROBATION AND PAROLE 27 (1964) (employment also important to success of parole). Thus, the revocation of petitioner's probation is rational because his loss of his job and inability to pay his modest fine and restitution amounts made him a poorer probation risk and made it more likely that he would commit another crime.

The revocation of petitioner's probation also rationally furthers the State's interest in protecting society by maintaining public confidence in Georgia's criminal justice system. If revocation were not permitted petitioner would escape punishment and, because he was sentenced under Georgia's first offenders' procedure, even avoid a conviction. Under Ga. Code Ann. § 27-2728 (Supp. 1981), one who successfully completes first offender's probation is "completely exonerate[d] . . . of any criminal purpose . . . and . . . not . . . considered to have a criminal conviction." Imagine the result if petitioner could misrepresent his financial ability to the sentencing court and then use his indigency like a sword to prevent revocation and obtain an acquittal under § 27-2728. It would not take many such cases to completely destroy public confidence in Georgia's criminal justice system. *See Burns, supra,* at 222.

Respondent's position that financial ability may be

considered in making revocation decisions is symmetrical with the unquestioned authority of states to consider financial ability in the decision to admit to probation. It is widely acknowledged that financial ability is and should be taken into account by a sentencing court when it makes a decision on admission to probation. Fed.R. Crim.P. 32(c)(2); Ga. Code Ann. §§ 27-2709(b), 3010 (a,b) (regarding restitution conditions) (Supp. 1981); R. CLEGG, *supra*, at 166-67; R. CARTER & L. WILKINS, *supra*, at 137-38; DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT, *reprinted in* R. CARTER & L. WILKINS, *supra*, at 176f. (recommended pre-sentence report includes detailed information on financial condition and employment), *cited in Williams v. New York*, 337 U.S. 241, 250 n. 15 (1949); R. CARTER & L. WILKINS, *supra*, at 221-22 (average monthly income and employment stability influence federal probation officers' recommendations and the sentences imposed by federal district courts). As the Court observed in *San Antonio Independent School District*, *supra*, "Sentencing judges may, and often do, consider the defendant's ability to pay. . . ." *Id.*, at 22 (dictum). In *Williams v. New York*, *supra*, the Court approved of the use in sentencing of out-of-court information, including financial and employment information. *Id.*, at 250 n. 15. If financial ability may be considered in making the decision to probate, it obviously may rightfully be considered in revocation. The Court has recognized that a sentencing court's wide discretion in deciding whether to admit an offender to probation is not restricted in modification and revocation decisions:

> There is no suggestion in the statute [federal probation act] that the scope of the discretion conferred

> for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former and is in terms equally broad. "The court may revoke or modify any condition of probation, or may change the period of probation.". . . . No criteria for modification are suggested which are in addition to, or different from those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant.

Burns, supra, at 156. This position is in keeping with the "wide discretion" vested in sentencing judges. *Williams v. Illinois, supra*, at 243.

The Georgia Supreme Court has cogently explained how a probationer's inability to meet financial conditions of his probation may affect his acceptability as a probation risk. A defendant's ability to pay a fine may influence a sentencing court's decision on whether he is a good probation risk, according to the Georgia Supreme Court. When it develops that a defendant who has expressed willingness to pay a fine cannot pay his fine this "materially alters the original considerations which went into the judgment." *Hunter v. Dean*, 240 Ga. 214, 219 (1977). The court explained how this development can alter a sentencing court's probation decision:

> [B]efore a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed

> by law. It was the judge's determination in this case, on the basis of the representation made to him, that Ms. Hunter would be a good probation risk should she first pay the fine that was imposed. The fine aspect of the judgment simply does not place the appellant in a position where she is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful.
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> * * *
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> That wealth may enable a defendant more easily to serve a term of probation successfully, is no doubt an advantage to the wealthy, but, with all other factors equal, if in a particular case the poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation.

Id., at 218-19. This reasoning is not matched by any of the federal court decisions which disagree. *Barnett v. Hopper*, 548 F.2d 550 (5th Cir. 1977); *Hutchinson v. Jones*, 477 F.Supp. 51 (N.D. Ga. 1979). Note that all of these cases involve the validity of a lump sum fine—an issue not presented here. Nevertheless the discussions are helpful.

Thus, it can be seen that the revocation of petitioner's probation rationally furthers the State's interest in administering probation in a fashion consistent with the protection of society. This is so because petitioner's loss of his job and inability to pay his fine and restitution balance reduced his chances of successful probation and made it more likely that he would commit another crime.[3]

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[3] Note that under Georgia law petitioner could have moved for modification of his sentences so as to reduce his fine and restitution. Ga. Code Ann. §§27-2709(g), 3012 (Supp. 1981). Although the record shows that petitioner made a motion to modify his sentences so as

In short, he was no longer a good probation risk. Moreover, the revocation helps maintain public confidence in the Georgia criminal justice system. The question here is not whether the revocation decision is wise or enlightened but whether it is rational in view of the state interests involved. Obviously, the decision falls well within the bounds of rationality—it is certainly not irrational, *Vance v. Bradley*, 440 U.S. 93, 111 (1979), or arbitrary, *Ross, supra*, at 607. Any other conclusion would itself be irrational and arbitrary.

Respondent also submits that the State's interest in rehabilitating petitioner is served by his probation revocation. Conditions of probation are usually tailored to limit the temptation to the probationer to commit another crime. *See Inman, supra*, at 193-94. Because, as the above-stated argument makes clear, there is a relationship between crime and probation failure on the one hand and unemployment and financial inability on the other, petitioner's loss of his job and inability to pay his fine and restitution placed him in the position of being easily led to commit another crime. The revocation of petitioner's probation for the balance of his sentence removed him from this temptation.[3]

Moreover, the state action in question should be considered in relation to the state's legitimate interest in seeing restitution made to crime victims. Petitioner was sentenced, under a new Georgia statute, to make resti-

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to receive credit for time spent on probation, it does not show that he moved the trial court to reduce his fine and restitution. (J.A. 18).

[3] Under Ga. Code Ann. §27-2713 (1978 Rev.), in event of revocation, probationers receive credit for the time already spent on probation. Petitioner's sentence was modified on September 17, 1981 so as to reflect this credit. (J.A. 18). Thus, petitioner did receive credit for his probation time.

tution to his victims. Ga. Code Ann. §§ 27-3001, et seq. (Supp. 1981). This statute requires that the financial ability of an offender be considered. Ga. Code Ann. § 27-3010(a, b) (Supp. 1981). It also provides that no offender can be discriminated against under this section because of his poverty:

> (a) Nothing in this Chapter shall authorize peonage, and this Chapter shall be construed and diligently administered to prevent peonage.
>
> (b) No offender shall be denied any benefit, relief, or privilege to which he might otherwise be entitled or eligible solely because he is financially unable and cannot become financially able to make restitution.

Ga. Code Ann. § 27-3016 (Supp. 1981). Petitioner led the sentencing court to believe that he could pay, and consented to pay, restitution. In view of the strong Georgia policy in favor of restitution this no doubt played a part in the court's decision to probate. It eventuated, however, that petitioner could not pay restitution. Thus, the Georgia policy in favor of restitution which it first appeared would be served by petitioner's probation, is not served. Thus, revocation is rational in view of this interest. Of course, petitioner's revocation, when looked at in isolation, does not promote the collection of restitution for his victims. However, the entire course of probation decisions affecting petitioner, is, as explained above, in keeping with the State's interest in restitution.

In deciding this case, the Court should consider the consequences of its decision for probation and other conditional release procedures. If the "wide discretion" of sentencing judges, *Williams v. Illinois*, *supra*, at 243, is curtailed so as to limit their ability to consider employment or financial data in probation decisions, it is likely

that probation and other forms of conditional release will be used less and more offenders will be sentenced to jail. *See, Burns, supra,* at 222; *Hunter, supra,* at 219. As the Georgia Supreme Court observed, "This result . . . does not bode well for the state and defendants, as a class, alike." *Id.*

We are thus led to the conclusion that the revocation of petitioner's probation is rational. Petitioner an admitted burglar with new burglary charges pending against him, was simply no longer a good probation risk when he lost his job and was unable to pay his modest fine and restitution amounts. His failure to obey the financial conditions of probation to which he had agreed[4] forced a reassessment of his probation-worthiness. The sentencing court concluded that in view of these developments petitioner was no longer an acceptable probation risk. Petitioner's probation was not revoked because of his financial inability *per se* but because of the adverse implications of his financial inability for his success on probation and likelihood of not committing additional crimes. Unlike in *Williams v. Illinois, supra,* and *Tate, supra,* in which the states promoted no legitimate penal or other objectives in imprisoning the defendants, petitioner's revocation rationally furthers legitimate state interests. In *Williams, supra,* the states' penal objectives had already been satisfied yet the defendants were punished by additional jail sentences. No such irrational or arbitrary fea-

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[4] The record does not support the inference that petitioner deliberately misrepresented his financial condition to the trial court. However, as one scholar has observed, "Probationers and parolees are prone to overestimate their capacity for self help." R. CLEGG, *supra,* at 74-75. But, whether petitioner deliberately misled the court or not, it is clear that the trial court sentenced him on the faulty premise that he was financially able to pay a fine and restitution.

tures affect the state action in question here. As outlined above, petitioner's revocation rationally furthers three state interests.

Finally, two other points about *Williams v. Illinois*, *supra*, should be mentioned. *First*, the Court said that states could not fail to enforce fines against indigents because to do would be "inverse discrimination." *Id.*, at 244. In the instant case, such inverse discrimination would be generated if petitioner were allowed not to pay his fine and restitution. *Second*, the Court cited with approval statutes of California, Michigan, and Pennsylvania—all of which permitted imprisonment in the event of a defendant's failure to pay a fine in installments as directed. *Id.*, at 245 n. 21, 247, 256. These points also weigh in favor of respondent's position.

CONCLUSION

For the above-stated reasons, the judgment of the Georgia Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GEORGE M. WEAVER, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent upon the Petitioner's attorney by depositing a copy of this brief in the United States mail with proper address and adequate postage to:

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This 14th day of September, 1982.

GEORGE M. WEAVER